

By: Ellis

S.B. No. 1680

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to certain evidence in a prosecution of fraud or theft  
3 involving Medicaid or Medicare benefits.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 38, Code of Criminal Procedure, is  
6 amended by adding Article 38.46 to read as follows:

7 Art. 38.46. EVIDENCE IN AGGREGATION PROSECUTION FOR FRAUD  
8 OR THEFT COMMITTED WITH RESPECT TO NUMEROUS MEDICAID OR MEDICARE  
9 RECIPIENTS. In trials involving an allegation of a continuing  
10 scheme of fraud or theft involving Medicaid or Medicare benefits  
11 that is alleged to have been committed with respect to a large class  
12 of Medicaid or Medicare recipients in an aggregate amount or value,  
13 the attorney representing the state is not required to prove by  
14 direct evidence that each alleged recipient did not consent or  
15 effectively consent to a transaction in question. It is sufficient  
16 if the lack of consent or effective consent to a particular  
17 transaction or transactions is proven by either direct or  
18 circumstantial evidence.

19 SECTION 2. Article 39.01, Code of Criminal Procedure, is  
20 amended to read as follows:

21 Art. 39.01. IN EXAMINING TRIAL. When an examination takes  
22 place in a criminal action before a magistrate, the state [~~State~~] or  
23 the defendant may have the deposition of any witness taken by any  
24 officer authorized by this chapter. The state [~~State~~] or the

1 defendant may not use the deposition for any purpose unless that  
2 party first acknowledges that the entire evidence or statement of  
3 the witness may be used for or against the defendant on the trial of  
4 the case, subject to all legal objections. The deposition of a  
5 witness duly taken before an examining trial or a jury of inquest  
6 and reduced to writing or recorded and certified according to law  
7 where the defendant was present when that testimony was taken, and  
8 had the privilege afforded of cross-examining the witness, or taken  
9 at any prior trial of the defendant for the same offense, may be  
10 used by either the state [~~State~~] or the defendant in the trial of  
11 the defendant's criminal case under the following circumstances:

12         When oath is made by the party using the deposition that the  
13 witness resides outside the state [~~State~~]; or that since the  
14 witness's testimony was taken, the witness has died, or has removed  
15 beyond the limits of the state [~~State~~], or has been prevented from  
16 attending the court through the act or agency of the other party, or  
17 by the act or agency of any person whose object was to deprive the  
18 state [~~State~~] or the defendant of the benefit of the testimony; or  
19 that by reason of age or bodily infirmity, that witness cannot  
20 attend; or that the witness is a Medicaid or Medicare recipient or a  
21 caregiver or guardian of the recipient, and the recipient's  
22 Medicaid or Medicare account was charged for a product or service  
23 that was not provided or rendered to the recipient. When the  
24 testimony is sought to be used by the state [~~State~~], the oath may be  
25 made by any credible person. When sought to be used by the  
26 defendant, the oath must be made by the defendant in person.

27         SECTION 3. Chapter 39, Code of Criminal Procedure, is

1 amended by adding Article 39.026 to read as follows:

2 Art. 39.026. DEPOSITIONS OF MEDICAID OR MEDICARE RECIPIENTS  
3 OR CAREGIVERS. (a) In this article:

4 (1) "Caregiver" means a person who is authorized by  
5 law, contract, or familial relationship to care for a recipient.

6 (2) "Medicaid" means the state Medicaid program.

7 (3) "Medicaid recipient" has the meaning assigned by  
8 Section 36.001, Human Resources Code.

9 (4) "Medicare" means the Health Insurance for the Aged  
10 Act (42 U.S.C. Section 1395 et seq.).

11 (5) "Medicare recipient" means an individual on whose  
12 behalf a person claims or receives a payment from Medicare, without  
13 regard to whether the person was eligible for benefits under  
14 Medicare.

15 (6) "Recipient" means a Medicaid recipient or a  
16 Medicare recipient.

17 (b) The court shall order the attorney representing the  
18 state to take the deposition of a recipient or caregiver who is the  
19 alleged victim of or witness to an offense constituting fraud or  
20 theft involving Medicaid or Medicare benefits not later than 180  
21 days after the date on which the state files an application to take  
22 the deposition under Article 39.02.

23 (c) On the motion of either party, the court may order the  
24 attorney representing the state to take the deposition of a  
25 recipient by video recording. The person operating the video  
26 recording device must be available to testify regarding the  
27 authenticity of the video recording and the taking of the

1 deposition in order for the video recording to be admissible.

2 (d) If the court finds that the video recording of the  
3 deposition is properly authenticated and that requiring the jury to  
4 view the entire recording would unnecessarily prolong the trial,  
5 the court may allow the state to offer the entire video recording  
6 into evidence without first requiring the jury to view the entire  
7 video recording. This subsection does not preclude the attorney  
8 representing the state, the defendant, or the defendant's attorney  
9 from offering into evidence and playing for the jury a portion of a  
10 video-recorded deposition.

11 (e) The attorney representing the state and the defendant or  
12 the defendant's attorney, by written agreement filed with the  
13 court, may extend the deadline for the taking of the deposition.

14 (f) The court shall grant any request by the attorney  
15 representing the state to extend the deadline for the taking of the  
16 deposition if a reason for the request is the unavailability,  
17 health, or well-being of the recipient or caregiver.

18 (g) The Texas Rules of Civil Procedure govern the taking of  
19 the deposition, except that, to the extent of any conflict with this  
20 code or applicable court rules adopted for criminal proceedings,  
21 this code and the rules for criminal proceedings govern. The  
22 attorney representing the state and the defendant or the  
23 defendant's attorney may agree to modify the rules applicable to  
24 the deposition by written agreement filed with the court before the  
25 taking of the deposition.

26 (h) If a defendant is unavailable to attend a deposition  
27 because the defendant is confined in a correctional facility, the

1 court shall issue any orders or warrants necessary to secure the  
2 defendant's presence at the deposition. The sheriff of the county  
3 in which a deposition is to be taken under this subsection shall  
4 provide a secure location for the taking of the deposition and  
5 sufficient law enforcement personnel to ensure the deposition is  
6 taken safely. The state's application to take a deposition or  
7 notice of deposition is not required to include the identity of any  
8 law enforcement agents the sheriff assigns to the deposition under  
9 this subsection, and the defendant may not object to the taking of  
10 the deposition based solely on the state's omission of the identity  
11 of a law enforcement agent assigned under this subsection.

12 (i) If a defendant is unavailable to attend a deposition for  
13 any reason other than confinement in a correctional facility, the  
14 defendant or the defendant's attorney shall request a continuance  
15 from the court. The court may grant the continuance if the  
16 defendant or the defendant's attorney demonstrates good cause for  
17 the continuance and that the request is not brought for the purpose  
18 of delay or avoidance. A defendant's failure to attend a deposition  
19 or request a continuance in accordance with this subsection  
20 constitutes a waiver of the defendant's right to be present at the  
21 deposition.

22 SECTION 4. Article 39.12, Code of Criminal Procedure, is  
23 amended to read as follows:

24 Art. 39.12. PREDICATE TO READ. Depositions taken in  
25 criminal actions shall not be read unless oath be made that the  
26 witness resides out of the state [~~State~~]; or that since the [~~his~~]  
27 deposition was taken, the witness has died; or that the witness [~~he~~]

1 has removed beyond the limits of the state [~~State~~]; or that the  
2 witness [~~he~~] has been prevented from attending the court through  
3 the act or agency of the defendant; or by the act or agency of any  
4 person whose object was to deprive the state or the defendant of the  
5 benefit of the testimony; or that by reason of age or bodily  
6 infirmity, the [~~such~~] witness cannot attend; or that the witness is  
7 a Medicaid or Medicare recipient or a caregiver or guardian of the  
8 recipient, and the recipient's Medicaid or Medicare account was  
9 charged for a product or service not provided or rendered to the  
10 recipient. When the deposition is sought to be used by the state  
11 [~~State~~], the oath may be made by any credible person. When sought  
12 to be used by the defendant, the oath shall be made by the defendant  
13 [~~him~~] in person.

14 SECTION 5. The change in law made by this Act applies to a  
15 criminal proceeding that commences on or after the effective date  
16 of this Act. A criminal proceeding that commences before the  
17 effective date of this Act is covered by the law in effect when the  
18 proceeding commenced, and the former law is continued in effect for  
19 that purpose.

20 SECTION 6. This Act takes effect September 1, 2011.